APPEAL NO. 93248

On February 11, 1993, a contested case hearing was held in (city), Texas, with Nannette Webster-Amador presiding as the hearing officer. The hearing officer determined that the appellant (claimant herein) was injured in the course and scope of his employment on (date of injury), but that he did not timely notify his employer of his injury and did not have good cause for failing to timely notify his employer, of his injury. The hearing officer further determined that the employer did not have actual knowledge of the claimant's injury. The hearing officer decided that the respondent (carrier herein) is not liable for payment of benefits to the claimant under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). The claimant disputes the hearing officer's adverse findings on the notice issue. The carrier responds that the claimant's request for review was not timely filed and that the findings and conclusions of the hearing officer are supported by the evidence.

DECISION

The decision of the hearing officer is affirmed.

The claimant's request for review was timely filed. Article 8308-6.41(a) provides that a party that desires to appeal the decision of the hearing officer shall file a written appeal with the Appeals Panel not later than the 15th day after the date on which the decision of the hearing officer is received from the Texas Workers' Compensation Commission (Commission) Division of Hearings. The letter from the Division of Hearings transmitting the hearing officer's decision to the parties is dated March 9, 1993; however, Commission records show that the decision was actually mailed to the parties on March 10, 1993. The claimant does not state when he received the decision. Accordingly, under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(h) (Rule 102.5(h)), the claimant is deemed to have received the decision on March 15, 1993, which was five days after the date mailed. A request for review is presumed to be timely filed if it is mailed on or before the 15th day after the date of receipt of the hearing officer's decision, and it is received by the Commission not later than the 20th day after the date of receipt of the decision. Rule 143.3(c). The 15th day after the deemed date of receipt was Tuesday, March 30, 1993. The claimant's request for review is postmarked March 30, 1993, and the Commission received it on April 1, 1993. Consequently, the request for review was timely filed.

The hearing was translated from English into Spanish by an interpreter.

The first issue at the hearing was whether the claimant sustained an injury in the course and scope of his employment on (date of injury). Prior to (date of injury), the claimant had worked off and on as a cement finisher for the employer. When the employer had finishing work to do, (JS), the employer's finishing foreman, would call the claimant to see if the claimant wanted to work. The claimant testified that on (date of injury), he and two coworkers, (EM) and (JA), were carrying a cement finishing machine at work when EM dropped his side of the machine which caused the machine to hit the claimant's knees and

pin him against a wall injuring his back. EM corroborated the claimant's testimony concerning the injury at work. JA could not recall the incident described by the claimant. The claimant went to a doctor in September 1992 and medical reports were admitted into evidence. The hearing officer found that the machine fell on the claimant on (date of injury), and concluded that the claimant sustained an injury in the course and scope of his employment on that day. The carrier did not appeal the determination of injury in the course and scope of employment.

The second issue at the hearing was whether the claimant notified his employer of his injury in a timely manner. Article 8308-5.01(a) provides that the employee or a person acting on the employee's behalf must notify the employer of an injury not later than the 30th day after the date on which the injury occurs. The notice may be given to the employer or any employee of the employer who holds a supervisory or management position. Article 8308-5.01(c). An employee's failure to notify the employer as required under Article 8308-5.01(a) relieves the employer and the carrier of liability, unless the employer or the carrier has actual knowledge of the injury or the Commission determines that good cause exists for failure to give notice in a timely manner. Article 8308-5.02.

The burden is on the claimant to establish the existence of notice of injury. Miller v. Travelers Insurance Company, 390 S.W.2d 284 (Tex. Civ. App.-El Paso 1965, no writ). To fulfill the purpose of the notice of injury provision, the employer need only know the general nature of the injury and the fact that it is job related. DeAnda v. Home Insurance Company, 618 S.W.2d 529 (Tex. 1980). A claimant who fails to give the employer notice of the alleged injury within the 30-day period has the burden to show good cause for such failure. Aetna Casualty & Surety Company v. Brown, 463 S.W.2d 473 (Tex. Civ. App.-Fort Worth 1971, writ ref'd n.r.e.). A bona fide belief of a claimant that injuries are not serious can constitute good cause for delay in giving notice of injury to the employer. Texas Casualty Insurance Company v. Crawford, 340 S.W.2d 110 (Tex. Civ. App.-Amarillo 1960, no writ). The test for good cause is that of ordinary prudence, that is, whether the claimant prosecuted his claim with the degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances. Hawkins v. Safety Casualty Co., 146 Tex. 381, 207 S.W.2d 370 (1948). Whether the claimant has used the degree of diligence required is ordinarily a question of fact to be determined by the trier of facts. Hawkins, *supra*. *See also* Texas Indemnity Insurance Company v. Cook, 87 S.W.2d 830 (Tex. Civ. App.-Austin 1935, writ ref'd) which holds that "[g]ood cause for delay from the viewpoint of ordinary prudence is ordinarily a question of fact; but where the evidence taken most strongly in favor of the claimant admits of but one reasonable conclusion negativing good cause, the question becomes one of law."

The hearing officer is the trier of fact in a contested case hearing and is the sole judge of the weight and credibility to be given to the evidence. Articles 8308-6.34(e) and (g). When presented with conflicting evidence, the trier of fact may believe one witness and

disbelieve others, and may resolve inconsistencies in the testimony of any witness. McGalliard v. Kuhlmann, 722 S.W.2d 694 (Tex. 1986).

The claimant testified that he did not work after (date of injury), because his leg was swollen and he was not feeling well. He said he did not think his injury was "a very big deal" and that he could take care of it himself with home remedies. He said he took pain pills his mother obtained in Mexico and applied Ben-Gay to his knee. He said that JS called him about 15 days after his accident and asked if he wanted to work and that JS called him several times after that asking the same question. The claimant's testimony concerning his responses to JS varied. One time he testified that when JS called him 15 days after the accident he told JS that he was having problems with his legs because he had been injured at work in an accident. At other times he testified that he told JS that he was not able to work because he was not feeling well or because his knee hurt, but did not tell JS anything about an accident at work until September 8 or 9, 1992, when he "could not deal with it any longer." He said that when he told JS in September 1992 that he had been injured at work, JS told him to go to the employer's office to see about getting a doctor, which he did. Around September 9, 1992, he spoke to (RH), assistant superintendent, who got him an appointment with Dr. B on September 15, 1992. Dr. B is the first and only doctor that the claimant has seen for his injury. He said that from the date of his injury to September 1992, he could not afford to go to a doctor and that he did not ask JS about going to a doctor when JS called him about available work because he wanted to see if his injury would cure itself.

JS testified that he was the claimant's foreman on (date of injury), that he did not see the claimant get injured on that day, and that he did not know anything about the claimant's accident at work until sometime in September 1992 (two or three weeks before the carrier's claims adjustor took his statement on October 1, 1992) when the claimant called him and told him about it. He said he told the claimant to tell the employer's superintendent about his injury. JS explained that he had called the claimant a few times prior to the claimant's call to him in September, but that the claimant did not mention being injured at work or being unable to work because of an injury until September. JS said that the claimant told him that he did not have transportation to get to work. He did not think it unusual for the claimant not to return to work after May 7th because he thought the claimant had gotten work with someone else.

RH testified that he did not know about the claimant's injury until about September 8 or 9, 1992 when JS called him about it and then the claimant came to the job site and told him he had been injured at work. RH testified that JS was very good about notifying the employer about all injuries that his crew reported to him.

The hearing officer found that the claimant did not report his injury of (date of injury), to his supervisor, JS, within 30 days of the injury, that the claimant did not report his injury to JS until September 8, 1992, and that the claimant did not have a satisfactory explanation

for his failure to report his injury prior to September 8, 1992. The hearing officer concluded that the claimant did not timely report his injury, that the claimant did not have good cause for failing to report his injury, and that the employer did not have actual knowledge of the injury. Having reviewed the record, we conclude that the hearing officer's findings and conclusions concerning the notice of injury issue are sufficiently supported by the evidence and are not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. The claimant did not assert and there was no evidence that the employer had actual knowledge of his injury. The claimant's testimony concerning his reporting of the injury to JS within 30 days was equivocal, whereas JS was adamant in his testimony that the injury was not reported to him until sometime in September. While the claimant's testimony that he did not think his injury was any big deal and would cure itself is some evidence of good cause for failure to timely report his injury, the hearing officer could reasonably conclude that the claimant did not use the degree of diligence required in the circumstances given the claimant's testimony that he was unable to work because of his injury during the four month period from the date of his injury to the reporting of the injury on September 8th.

The decision of the hearing officer is affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Gary L. Kilgore
Appeals Judge